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LIMITED and KONSTANTIN GRIGORISHIN
7

8 IN THE UNITED STATES DISTRICT COURT
9 NORTHERN DISTRICT OF CALIFORNIA
10 SAN FRANCISCO DIVISION

11 DASTIME GROUP LIMITED, a British
Virgin Islands Company, and
12 KONSTANTIN GRIGORISHIN, an
individual,

13 Petitioners,

14 vs.

15 MOONVALE INVESTMENTS LIMITED, a
British Virgin Islands Company, and PETER
16 KIRITCHENKO, an individual,

17 Respondent.

Case No.

**DASTIME GROUP LIMITED'S AND
KONSTANTIN GRIGORISHIN'S
PETITION TO CONFIRM FINAL
ARBITRATION AWARD**

Date:
Time:
Courtroom:
Judge: Hon.

1 **I. INTRODUCTION**

2 1. Petitioners Dastime Group Limited and Konstantin Grigorishin (“Petitioners”) seek
 3 to confirm an arbitration award under the New York Convention on the Recognition and
 4 Enforcement of Foreign Arbitral Awards (“New York Convention”), as implemented by the
 5 Federal Arbitration Act (“FAA”), 9 U.S.C. § 201 *et seq.* On October 21, 2013, Moonvale
 6 Investments Limited (“Moonvale”), as purported assignee of claims held by assignor Peter
 7 Kiritchenko (“Kiritchenko”), commenced a JAMS arbitration against Petitioners. The basis for
 8 the arbitration was a contractual arbitration clause contained in a written June 28, 2006 agreement
 9 (“Agreement”) between Petitioners and Moonvale’s assignor Kiritchenko. On March 14, 2014,
 10 Petitioners counter-claimed in the arbitration against Moonvale and cross-claimed against
 11 Kiritchenko. The arbitration, involving foreign commercial businesses, assets, and parties, was
 12 conducted in San Francisco under JAMS International Rules by a sole arbitrator, retired judge
 13 Rebecca Westerfield, who issued a Final Corrected Award on March 24, 2017 (“Final Award”).
 14 *See* Declaration of Neil A. Goteiner (“Goteiner Decl.”) at Ex. 1 (Final Award).¹ The Final Award
 15 dismissed all of Moonvale’s claims against Petitioners, found in favor of Petitioners on their
 16 counter- and cross-claims, and awarded Petitioners their reasonable fees and costs incurred in the
 17 arbitration. Petitioners now seek to confirm that Final Award.

18 2. The Agreement provides that the “award or other final determination of such
 19 arbitrator shall be final and binding upon the Parties. Any award of the arbitrator may be executed
 20 in any court of competent jurisdiction.”

21 3. Confirmation of the Final Award is proper under the New York Convention and the
 22 FAA, both of which implement congressional policy favoring the resolution of disputes through
 23 arbitration. Under both, the courts have little discretion to overturn an arbitral award.

24 **II. THE PARTIES**

25 4. Petitioner Dastime Group Limited (a respondent in the arbitration) is a British
 26 Virgin Island (“BVI”) company.

27 5. Petitioner Konstantin Grigorishin (a respondent in the arbitration) is a Russian
 28 _____

¹ All exhibits referenced herein are to the Declaration of Neil A. Goteiner.

1 businessman who does business in Ukraine, and owns and controls Dastime Group Limited.

2 6. Respondent Moonvale (a claimant in the arbitration) is a BVI company created
3 apparently for the sole purpose of bringing the arbitration against Petitioners, and is the assignee
4 of claims that Kiritchenko held.

5 7. Respondent Kiritchenko (who notwithstanding his assignment of his claims to
6 Moonvale, retained a contingency interest in the outcome of the arbitration, thereby making him
7 effectively the second claimant) is a former Ukrainian businessman currently residing in the
8 United States. In 2000, Kiritchenko pled guilty to U. S. felony charges (receipt of stolen property)
9 in the Northern District of California arising from his involvement in an international extortion
10 and money laundering scheme involving Kiritchenko's boss, former Ukrainian Prime Minister
11 Pavlo Lazarenko. Kiritchenko received lenient treatment in return for his testimony, for pleading
12 guilty to a felony, and for his cooperation with U.S. authorities against Lazarenko. *See* Final
13 Award at 15.

14 **III. JURISDICTION AND VENUE**

15 8. Jurisdiction in this Court is proper under 9 U.S.C. § 203, which states that the
16 United States district courts, "shall have original jurisdiction" over an action that falls under the
17 New York Convention. This action falls under the New York Convention as it concerns an
18 "arbitral award arising out of a legal relationship . . . which is considered as commercial" and is
19 not an "award arising out of such a relationship which is entirely between citizens of the United
20 States." 9 U.S.C. § 202. In addition, the parties' "relationship involves property located abroad,
21 envisages performance or enforcement abroad, or has some other reasonable relation with one or
22 more foreign states." *Id.* It is beyond dispute that the parties' relationship is commercial and that
23 it is not entirely between citizens of the United States. Indeed, Petitioners believe that no party is
24 a U.S. citizen: Petitioners and Moonvale are foreign citizens; while Kiritchenko is a U.S. resident,
25 Petitioners do not believe that he is a U.S. citizen based on his sworn declaration in this matter in
26 which he denied U.S. citizenship. *See* Goteiner Decl. at ¶ 2. Furthermore, the claims all involved
27 disputes over ownership of various BVI holding companies used to make investments *inter alia* in
28 Ukrainian energy distribution and metallurgy companies. *See* Ex. 1, Final Award at 14. In

1 addition, Petitioners envision that they will need to enforce collection efforts abroad given that any
 2 Moonvale assets, and those of its alter egos and aiders and abettors, are outside the United States.
 3 Because of the international nature of this arbitration, JAMS conducted it under JAMS
 4 International Rules. Ex.1, Final Award at 5 and fn. 2.

5 9. Venue in this Court is proper pursuant to 9 U.S.C. § 204 because this is the Court
 6 for the “district and division which embraces the place designated in the agreement as the place of
 7 arbitration.” The Agreement states that the arbitration “shall be conducted in San Francisco,
 8 California,” and it was so conducted.

9 **IV. STATEMENT OF FACTS**

10 10. Prior to the arbitration, Petitioners had no relationship with Moonvale, the
 11 purported “Claimant” in the arbitration. Petitioners still are unaware of all the persons who are
 12 actually behind Moonvale. Moonvale claims to have taken an assignment from Kiritchenko of
 13 claims Kiritchenko supposedly had against Petitioners arising from the June 28, 2006 Agreement
 14 between Petitioners and Kiritchenko. *See* Goteiner Decl. Ex. 2 (“Agreement”). Under the
 15 Agreement, Kiritchenko received \$14.5 million for selling his claimed ownership interests in
 16 Petitioners’ businesses and releasing all claims against Petitioners related to those businesses. *Id.*
 17 The Agreement required Kiritchenko to keep its existence and terms confidential and to support
 18 Petitioners’ claim to 100% ownership of the businesses. *Id.* The Agreement also has a San
 19 Francisco JAMS arbitration clause. *Id.*

20 11. Some *seven years later* in 2013, Kiritchenko and other unknown foreign backers
 21 hatched a scheme to take illegitimate advantage of the arbitration provision by asserting claims to
 22 Petitioners’ businesses (claims that Kiritchenko had sold and released in the Agreement). Under
 23 this scheme, Kiritchenko sold confidential documents and assigned any claims concerning
 24 Petitioners’ businesses and the Agreement to Moonvale, a BVI corporate shell apparently created
 25 solely to bring the arbitration against Petitioners. Moonvale then filed the arbitration in its
 26 corporate shell name claiming that Petitioner Grigorishin duped Kiritchenko into entering the
 27 Agreement – a \$14.5 million Agreement negotiated by his sophisticated counsel. Anticipating the
 28 obvious statute of limitations defense, Moonvale claimed delayed discovery and tolling for

1 fraudulent concealment, asserting that Kiritchenko did not learn of the relevant facts giving rise to
2 his claims until December 2010 (just barely within the three-year California limitations period for
3 fraud given the October 2013 arbitration filing date). Thus Moonvale, as Kiritchenko's assignee,
4 claimed that it should be allowed to rescind the seven year old release and to claim a 50% interest
5 in Petitioners' businesses.

6 12. Pursuant to Paragraph 10 of the Agreement, on October 21, 2013, Moonvale filed
7 its arbitration against Petitioners in San Francisco JAMS. Petitioners successfully petitioned
8 JAMS to rule that the arbitration was "international" and thus subject to JAMS International
9 Arbitration Rules and to add Kiritchenko as a cross-respondent. *See* Ex. 1, Final Award at 5-6.
10 JAMS assigned Judge Westerfield (Ret.) as the Arbitrator.

11 13. Paragraph 10 of the Agreement further states that, "the award or other final
12 determination of such arbitrator shall be final and binding upon the Parties. Any award of the
13 arbitrator may be executed in any court of competent jurisdiction. . . . For the purposes of
14 enforcing this arbitration clause, or enforcing any arbitration award, the Parties consent to the
15 jurisdiction and venue in the state and federal courts located in California. The award of the
16 arbitrator shall also be enforceable in any court having jurisdiction over the Parties against whom
17 the award has been rendered, or where assets of such Party are located, and the Parties waive any
18 objection to the action based upon lack of jurisdiction or inconvenient forum."

19 14. The arbitration was hard-fought and costly, spanning over three years. The parties
20 engaged in a lengthy and contentious discovery process, resulting in multiple motions to compel,
21 numerous conference calls with Judge Westerfield, and an in-person discovery hearing. *See*
22 Goteiner Decl. at ¶ 3. Over 60,000 pages of documents, most of which required translation, were
23 produced. *Id.*

24 15. On September 9, 2015, after many disputes and delays, and after Moonvale's
25 counsel (Morrison & Foerster) abruptly withdrew the same day it finally produced withheld
26 documents extremely damaging to Moonvale's "delayed discovery" position, Judge Westerfield
27 bifurcated the arbitration pursuant to JAMS International Rule 20, granting an evidentiary hearing
28 to decide the dispositive issue of whether all of Moonvale's claims were barred by the statute of

1 limitations. *See* Ex. 1, Final Award at 6-7. Petitioners, while disputing that they had engaged in
 2 any fraudulent inducement with respect to the Agreement, argued that their statute of limitations
 3 defense was in any event dispositive because Kiritchenko was undeniably on legal notice – even
 4 before entering the Agreement – of the facts he claimed were misrepresented or suppressed. Thus,
 5 any and all applicable statutes of limitation had long expired before Kiritchenko (through
 6 Moonvale) asserted claims some seven years later in 2013.

7 16. Both parties submitted extensive written pre-hearing briefing and evidence. An in-
 8 person hearing was held at JAMS from December 7-8, 2015. Three people testified at the hearing:
 9 Kiritchenko, Kiritchenko's attorney Mr. Stan Roman, and former managing director of the alleged
 10 joint business Alexander Vartanyan. Both Kiritchenko and Vartanyan, as Moonvale witnesses,
 11 had contingency interests in any arbitration award to Moonvale. Moonvale and Kiritchenko
 12 objected to Petitioners' refusal to present Grigorishin and Igor Kuida, Grigorishin's business
 13 partner, as witnesses. But the Arbitrator ruled that testimony was unnecessary because she was
 14 assuming for the purposes of the bifurcated hearing, and resolution of Petitioners' statute of
 15 limitations defense, that Petitioners made the alleged misrepresentations and omissions. Thus, the
 16 only issue to be decided was whether – notwithstanding any such assumed misrepresentations and
 17 omissions – Kiritchenko (and thus Moonvale standing in his shoes as assignee) was already on
 18 sufficient legal notice of the claims from other sources prior to the running of the statute of
 19 limitations period. Following the hearing, the parties submitted written post-hearing briefing. *Id.*
 20 at 7.

21 17. On March 14, 2016, Judge Westerfield issued an Interim Award dismissing all of
 22 Moonvale's claims against Petitioners. The Arbitrator found that Kiritchenko was on legally
 23 sufficient inquiry notice of Petitioners' alleged wrongdoing as of 2006, before he ever entered the
 24 Agreement. *Id.* at 25. Indeed, the evidence showed that Kiritchenko and his counsel had
 25 discussed possible agreements with third-parties in 2005-2006 to fund litigation against Petitioners
 26 arising from the same events they claimed Kiritchenko was ignorant about until late 2010. *Id.* at
 27 17-20, 25-27, 35. The Arbitrator thus dismissed all of Moonvale's causes of action since
 28 Moonvale (standing in Kiritchenko's shoes) was bound by Kiritchenko's notice of the claims

1 dating back to before the 2006 Agreement.

2 18. Having dismissed all of Moonvale's claims, the Arbitrator was left to decide
3 Petitioners' counter- and cross-claims against Moonvale and Kiritchenko (*e.g.*, for breach of
4 contract and interference with contractual relations), as well as Petitioners' entitlement to
5 attorneys' fees and costs. All parties agreed to submit these issues to the Arbitrator on paper with
6 accompanying declarations and exhibits. *Id.* at 8-9. The parties further stipulated that all exhibits
7 and declarations submitted after December 2015 could be considered as evidence. *Id.* The issues
8 were fully briefed, and an oral argument was held on July 6, 2016.

9 19. On September 6, 2016, Judge Westerfield issued a Second Interim Award granting
10 Petitioners' counter- and cross-claims against Moonvale and Kiritchenko for breach of contract
11 and intentional interference with contractual relations, and granting Petitioners' request for
12 reasonable costs and attorneys' fees. In ruling, the Arbitrator found that Kiritchenko's core
13 assertion that he was not aware of these claims earlier and that he was relying on Petitioner
14 Grigorishin's valuation of the business was "preposterous" and "irrational." *Id.* at 35.

15 20. The parties subsequently briefed the amount of Petitioners' fees, with Moonvale
16 and Kiritchenko submitting a single-spaced 41-page expert report (excluding exhibits) challenging
17 Petitioners' attorneys' fees and costs, including Petitioners' attorneys' hourly rates. Petitioners
18 deposed Respondents' expert and submitted his testimony to the Arbitrator. On February 9, 2017,
19 Judge Westerfield entered the Final Award including her determination of attorneys' fees and
20 costs. The parties submitted requests for clarification and corrections to the Final Award. Judge
21 Westerfield held a telephonic hearing on the parties' various requests on March 14, 2017. *Id.* at
22 10.

23 21. On March 23, 2017, Judge Westerfield issued a Corrected Final Award that slightly
24 reduced the amount of the fees and costs awarded. *See* Goteiner Decl. at Ex. 1 ("Final Award").
25 This Final Award provided \$3,319,232.40 for Farella Braun + Martel LLP's attorneys' fees and
26 costs, \$2,101,899.70 for Egorov Puginsky Afanasiev & Partners' attorneys' fees and costs, and
27 \$279,000.00 for Petitioner Dastime Group Limited's costs. The Final Award holds Respondents
28 Moonvale and Kiritchenko jointly and severally liable to Petitioners Dastime Group Limited and

1 Konstantin Grigorishin for fees and costs totaling \$5,700,132.10. *Id.* at 62-63. The Final Award
 2 states that it is “subject to confirmation by a court of competent jurisdiction.” *Id.* at 65.

3 **V. ARGUMENT**

4 22. The law governing the confirmation of arbitral awards is straightforward, and
 5 implements the strong congressional policy favoring arbitration. This policy applies “with special
 6 force in the field of international commerce.” *Mitsubishi Motors Corp. v. Soler Chrysler—*
 7 *Plymouth, Inc.*, 473 U.S. 614, 631 (1985).

8 23. The FAA provides that within three years of an arbitral award falling under the
 9 New York Convention, “any party to the arbitration may apply . . . for an order confirming the
 10 award as against any other party to the arbitration.” 9 U.S.C. § 207. Under Article IV of the New
 11 York Convention, which is incorporated into Chapter 2 of the FAA, the petitioning party must
 12 provide “[t]he duly authenticated original award or a duly certified copy thereof,” and “[t]he
 13 original agreement” or “a duly certified copy thereof.” “The court shall confirm the award unless
 14 it finds one of the grounds for refusal or deferral of recognition or enforcement of the award
 15 specified in the said Convention.” 9 U.S.C. § 207; *see Ministry of Def. of the Islamic Republic of*
 16 *Iran v. Gould, Inc.*, 969 F.2d 764, 770 (9th Cir. 1992) (mandatory language of the FAA leaves
 17 the court with “little discretion”).

18 24. The New York Convention’s grounds for refusing confirmation are limited to: (1)
 19 lack of capacity of a party or invalidity of the arbitration agreement; (2) lack of proper notice or
 20 inability to present a case; (3) the award goes beyond the scope of the submission to arbitration;
 21 (4) the composition of the arbitral tribunal or the arbitral procedures were not in accordance with
 22 the parties’ agreement or the applicable law; (5) the award has not yet become binding or has been
 23 set aside by a competent authority; (6) the subject matter of the dispute is not capable of being
 24 arbitrated; and (7) recognition of the award would be contrary to public policy of that country.
 25 New York Convention, Article V. “[T]he party opposing confirmation” bears the burden of
 26 proving that one of these narrow grounds applies. *Ministry of Def. of the Islamic Republic of Iran*,
 27 969 F.2d at 770. These grounds “should be construed narrowly” in conformity with the
 28 Convention’s “general pro-enforcement bias.” *Id.* (citations and internal quotations omitted).

1 25. Petitioners have met all requirements to confirm the Award here. Petitioners
 2 provide as Exhibit 1 and 2 to the Goteiner Declaration duly certified copies of the 2006 Agreement
 3 containing the arbitration provision and the Final Award. Furthermore, none of the statutory
 4 grounds for refusing to confirm an arbitration award under the New York Convention applies here.
 5 The Final Award was made pursuant to a valid arbitration agreement. Each party was present
 6 throughout the arbitration and was able to present their case. The Final Award was made in
 7 accordance with the terms and provisions of the Agreement. The Final Award is final and
 8 enforceable, and the arbitration process and Arbitrator were in accordance with the Agreement.
 9 As such, this Court should confirm Petitioners' Final Award.

10 26. The Arbitrator also properly awarded Petitioners attorneys' fees and costs as the
 11 prevailing party to the arbitration over the objections of Respondents Moonvale and Kiritchenko.
 12 As detailed in the Final Award, this was an international arbitration under the JAMS International
 13 Rules. Ex. 1, Final Award at 38. Under JAMS International Rules 34.1 (instructing the Tribunal
 14 to fix the arbitration costs in its award) and 34.4 (holding that arbitration costs consist of the
 15 "reasonable costs for legal representation of a successful party"), Petitioners were entitled to
 16 reasonable attorneys' fees and costs. *Id.* at 39-40. Furthermore, the Arbitrator found that under
 17 California Code of Civil Procedure Sections 1033.5(a)(10) and 1297.318, the rules for domestic
 18 and international arbitration respectively, attorneys' fees were recoverable. *Id.* The Arbitrator
 19 also thoroughly considered the amount of the award and the methodology of its determination,
 20 including Moonvale/Kiritchenko's fee expert's report and the expert's deposition, which
 21 discussion spans 19 pages of the Final Award. *Id.* at 42-61. As such, Petitioners ask that this
 22 Court confirm the Final Award.

23 27. This Court also has discretion to award Petitioners post-award, pre-judgment
 24 interest. *See Ministry of Def. & Support for the Armed Forces of the Islamic Republic of Iran v.*
 25 *Cubic Def. Sys., Inc.*, 665 F.3d 1091, 1103 (9th Cir. 2011) ("federal law allows a district court to
 26 award post-award, prejudgment interest in actions under the New York Convention"). Here,
 27 despite having no valid reason to do so, Kiritchenko has indicated that he may oppose
 28 confirmation of the Final Award. Absent an award of post-award interest, Kiritchenko as "the

1 losing party in the arbitration has ‘an incentive . . . to withhold payment’—a result contrary to the
 2 purposes of the Convention.” *Id.*

3 28. Finally, Kiritchenko and Moonvale have indicated that they will oppose
 4 confirmation of this Petition. (Goteiner Decl. at ¶ 6, and Ex. 3 thereto). Petitioners are therefore
 5 entitled under California law to their attorneys’ fees and costs spent on this Petition to confirm the
 6 Final Award. “[A] contract provision that permits the recovery of fees in arbitration is broad
 7 enough to include fees in related judicial proceedings, including an appeal from the judgment
 8 confirming the award. *Ajida Techs., Inc. v. Roos Instruments, Inc.*, 87 Cal. App. 4th 534, 552
 9 (2001). Here, the Agreement incorporates the JAMS International Rules, which as set forth *infra*
 10 at paragraph 25, permits attorneys’ fees for the “reasonable costs for legal representation of a
 11 successful party.” This court can properly decide the issue of attorneys’ fees. *See Acosta v.*
 12 *Kerrigan*, 150 Cal. App. 4th 1124, 1130 (2007) (“it makes more sense to have the judge who
 13 heard the petition to compel arbitration decide the fee award claim, too, rather than asking an
 14 arbitrator to come up with a reasonable fee award specifically related to a motion he or she did not
 15 hear or decide”).

16 29. In addition, Respondents’ opposition to this Petition is in bad faith, for the reasons
 17 set forth above. In such situations, and under the New York Convention, the Ninth Circuit held
 18 that “federal courts have authority to award attorney’s fees when the losing party has acted in bad
 19 faith, vexatiously, wantonly or for oppressive reasons.” *Id.* at 1104. “[A]n unjustified refusal to
 20 abide by an arbitrator’s award may equate an act taken in bad faith, vexatiously or for oppressive
 21 reasons.” *Sheet Metal Workers’ Int’l Ass’n Local Union No. 359 v. Madison Indus., Inc. of*
 22 *Arizona*, 84 F.3d 1186, 1192 (9th Cir. 1996). As such, the Ninth Circuit in *Ministry of Defense*
 23 *and Support* specifically rejected the argument that federal courts could not award attorneys’ fees.
 24 665 F.3d at 1104 (“we hold that federal law permits an award of attorney’s fees in an action under
 25 the Convention, as it does in other federal question cases). On remand, the district court awarded
 26 \$131,083.50 in attorneys’ fees, holding that the losing party’s conduct amounted to an “unjustified
 27 refusal to abide by an arbitrator’s award” and “frivolous dilatory tactics.” *Ministry of Def. &*
 28 *Support for Armed Forces of Islamic Republic of Iran v. Cubic Def. Sys., Inc.*, No. 98-CV-1165-B

DHB, 2013 WL 55828, at *6-7 (S.D. Cal. Jan. 3, 2013). Other courts have followed the Ninth Circuit's holding in awarding attorneys' fees spent confirming an award under the New York Convention. *See Concesionaria Dominicana de Autopistas y Carreteras, S.A. v. Dominican State*, 926 F. Supp. 2d 1, 3 (D.D.C. 2013) (awarding \$324,932.76 in attorneys' fees and costs under the New York Convention where the losing party simply ignored the arbitral award, which was found to be "inherently unjustified and in bad faith"); *Swiss Inst. of Bioinformatics v. Glob. Initiative on Sharing All Influenza Data*, 49 F. Supp. 3d 92, 99 (D.D.C. 2014) (awarding attorneys' fees incurred in confirming the award). Here, Respondents Moonvale and Kiritchenko have no valid reason to oppose confirmation of the Final Award, and Petitioners should be granted any attorneys' fees spent to enforce it.

VI. CONCLUSION

30. The Petition here has met all the requirements necessary for confirmation. There is no valid argument against confirming the award – the arbitration was conducted pursuant to the terms of the parties' Agreement; all parties engaged in extensive discovery and briefing; the arbitrator was fair and impartial, and heard and ruled upon all matters properly before her; the parties were afforded the opportunity to present their case; and the arbitrator issued a well-reasoned, final, and binding Final Award. Respondents Moonvale and Kiritchenko have no legitimate basis for opposing this Petition. Petitioners request that the Final Award be confirmed with post-award, pre-judgment interest, and that Petitioners be awarded their attorneys' fees and costs if Respondents oppose confirmation.

Dated: April 3, 2017

Respectfully submitted,

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